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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

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In re:	: Chapter 11
	: :
MPM Silicones, LLC, <u>et al.</u> , ¹	: Case No. 14-22503 (RDD)
	: :
Debtors.	: (Jointly Administered)
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¹ The Debtors in these Chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Juniper Bond Holdings I LLC (9631), Juniper Bond Holdings II LLC (9692), Juniper Bond Holdings III LLC (9765), Juniper Bond Holdings IV LLC (9836), Momentive Performance Materials China SPV Inc. (8469), Momentive Performance Materials Holdings Inc. (8246), Momentive Performance Materials Inc. (8297), Momentive Performance Materials Quartz, Inc. (9929), Momentive Performance Materials South America Inc. (4895), Momentive Performance Materials USA Inc. (8388), Momentive Performance Materials Worldwide Inc (8357), and MPM Silicones, LLC (5481).

**JOINT RESPONSE OF THE BANK OF NEW YORK MELLON TRUST
COMPANY, N.A., IN ITS CAPACITY AS FIRST LIEN TRUSTEE, AND
WILMINGTON TRUST, N.A., IN ITS CAPACITY AS 1.5 LIEN TRUSTEE, TO
THE OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS TO THE DEBTORS' MOTION TO OBTAIN POSTPETITION
FINANCING, USE CASH COLLATERAL, AND GRANT ADEQUATE
PROTECTION TO THE PREPETITION SECURED LENDERS**

The Bank of New York Mellon Trust Company, N.A., in its capacity as trustee (the “**First Lien Trustee**”) under that certain indenture dated as of October 25, 2012, as supplemented by that certain supplemental Indenture, dated as of November 12, 2012 (as further modified, supplemented and/or amended and in effect on the date hereof) for the 8.875% First-Priority Senior Secured Notes due 2020 issued by Debtor Momentive Performance Materials Inc. (“**MPM**”) and guaranteed by certain of the above-captioned debtors and debtors in possession (collectively with MPM, the “**Debtors**”), and Wilmington Trust, N.A., as successor indenture trustee (the “**1.5 Lien Trustee**” and, together with the First Lien Trustee, the “**Trustees**”) under that certain indenture dated as of May 25, 2012, for the 10% Senior Secured Notes due 2020 issued by MPM and guaranteed by certain of the Debtors, hereby file this joint response (the “**Response**”) to the *Objection of the Official Committee of Unsecured Creditors to the Debtors’ Motion to Obtain Postpetition Financing, Use Cash Collateral, and Grant Adequate Protection to the Prepetition Secured Lenders* [Dkt. No. 204] (the “**Objection**”), filed by the official committee of unsecured creditors appointed in the Debtors’ chapter 11 cases (the “**Committee**”), to the *Debtors’ Motion for Interim and Final Orders Under 11 U.S.C. §§ 105, 361, 362, 363(c), 363(d), 364(c), 364(d), 364(e) and 507 and Fed. R. Bankr. P. 2002, 4001 and 9014: (I) Authorizing the Debtors to Obtain Postpetition Financing; (II) Authorizing Debtors to Use Cash Collateral; (III) Granting Adequate Protection to Prepetition Secured Lenders; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 2002, 4001 and 9014* [Dkt. No. 13]

(the “**DIP Financing Motion**”)² and the Debtors’ proposed form of final order granting the DIP Financing Motion [Dkt. No. 198, Exhibit A] (the “**Final DIP Order**”). In support of this Response, the Trustees respectfully represent as follows:

PRELIMINARY STATEMENT

1. The Committee’s Objection raises issue with, among other things, certain provisions in the proposed Final DIP Order as to the Prepetition Secured Parties relating to the Debtors’ section 506(c) waiver, the waiver of the “equities of the case” exception under section 552(b) of the Bankruptcy Code and the limitation on marshaling. The foregoing provisions in the proposed Final DIP Order were heavily negotiated aspects of the Debtors’ DIP financing and are core elements of a settlement by and between the Debtors and a number of their secured creditor constituencies in these chapter 11 cases, including the Trustees. In consideration for these provisions, the Trustees have made substantial concessions as part of the negotiations on the Debtors’ DIP financing, including, among other things, the Trustees’ consent to being primed by approximately \$570 million, as well as agreeing to partially fund these chapter 11 cases through a substantial Carve-Out. See Final DIP Order ¶ 7(b). These concessions bestow a direct benefit on the Debtors and their estates by avoiding costly litigation surrounding the provision of adequate protection to the Trustees and avoid a lengthy valuation trial at this stage of the Debtors’ chapter 11 cases. This Court should not permit the Committee to blue-line the negotiated points of an overall deal reached between the Debtors and their various secured creditor constituencies on the Debtors’ DIP financing.³

² Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to those terms in the DIP Financing Motion or in the proposed Final DIP Order, as applicable.

³ The Trustees have relied on the negotiated settlement relating to the Debtors’ DIP financing. To the extent that this settlement is unraveled, the Trustees respectfully request that this Court (a) approve the DIP Financing Motion on an interim basis only, so that the Trustees are not unduly prejudiced by their reliance on such

RESPONSE

I. The Debtors' waiver under section 506(c) of the Bankruptcy Code as to the Trustees, the First Lien Noteholders and the 1.5 Lien Noteholders is customary and should be approved.

2. The Committee's Objection to the section 506(c) waiver as to the Trustees, the First Lien Noteholders and the 1.5 Lien Noteholders should be overruled. Section 506(c) of the Bankruptcy Code permits a debtor (or a trustee) to recover from property securing an allowed claim the reasonable costs of preserving such property. See 11 U.S.C. § 506(c). As consideration for the Trustees consenting to being primed by approximately \$570 million and agreeing to the Carve-Out, the Debtors have agreed to provide the Trustees, the First Lien Noteholders and the 1.5 Lien Noteholders with a section 506(c) waiver.

3. It is well established that the Debtors are vested with the discretion to waive section 506(c) of the Bankruptcy Code. As a threshold matter, section 506(c) claims are available to, and are an asset of, the Debtors, and not to any other creditor or party-in-interest. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000). Indeed, the right of a party-in-interest, including the Committee, to be heard on any issue arising in a bankruptcy case pursuant to section 1109(b) of the Bankruptcy Code does not entitle it to usurp the Debtors' exclusive role under section 506(c) of the Bankruptcy Code. See id. at 4.

4. Moreover, the section 506(c) waiver is particularly appropriate where, as here, the Trustees have consented to being primed by approximately \$570 million and have agreed to a substantial Carve-Out. Indeed, this Court has repeatedly endorsed section 506(c) waivers as to a debtor's prepetition lenders in approving DIP financing on a final basis. See, e.g., In re TBS Shipping Servs., Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 28, 2012)

settlement, the First Lien Trustee can continue its discovery and the Trustees can assert objections they deem appropriate, and (b) strike the Carve-Out. See infra p. 6, ¶ 9 & n.5.

[Dkt. No. 75]; In re Hostess Brands, Inc., Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2012) [Dkt. No. 254]; In re The Reader's Digest Ass'n, Inc., Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Oct. 7, 2009) [Dkt. No. 152]; In re Delphi Corp., Case No. 05-44481 (RDD) (Bankr. S.D.N.Y. Jan. 5, 2007) [Dkt. No. 6461].

II. The Debtors' waiver of the "equities of the case" exception under section 552(b) of the Bankruptcy Code is customary and should be approved.

5. There is no basis for the Committee's argument that the waiver of the "equities of the case" exception under section 552(b) of the Bankruptcy Code should not be approved. Section 552(b) of the Bankruptcy Code generally provides that a perfected lien on prepetition collateral extends to postpetition proceeds of such collateral unless the court orders otherwise based on the "equities of the case." See 11 U.S.C. § 552(b). Courts in this district have generally held that a waiver of section 552(b) of the Bankruptcy Code is appropriate where the lenders, as here, have subordinated their claims to a carve-out. See In re Blockbuster Inc., Case No. 10-14997, 2010 WL 4873646, at *18 (Bankr. S.D.N.Y. Sept. 24, 2010); In re General Growth Props., Inc., 412 B.R. 122 (Bankr. S.D.N.Y. 2009). Moreover, the Debtors' waiver of the "equities of the case" exception is part and parcel of a settlement relating to the adequate protection provided to the Trustees, the First Lien Noteholders and the 1.5 Lien Noteholders, thereby avoiding costly litigation surrounding these issues before this Court.

6. In multiple cases, this Court has entered orders granting a waiver of the "equities of the case" exception to section 552(b) of the Bankruptcy Code as to a debtor's prepetition lenders in similar circumstances. See, e.g., In re TBS Shipping Servs., Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 28, 2012) [Dkt. No. 75]; In re Hostess Brands, Inc., Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2012) [Dkt. No. 254]; In re Fortunoff Holdings, LLC, Case No. 09-10497 (RDD) (Bankr. S.D.N.Y. May 5, 2009) [Dkt. No. 659]. Accordingly,

this Court should deny the Committee's Objection to the waiver of the "equities of the case" exception in connection with approval of the proposed Final DIP Order.

III. The prohibition on marshaling is appropriate.

7. In addition, the Committee has argued that this Court should not approve a limitation on marshaling.⁴ However, there is nothing unreasonable about granting such a customary waiver. This Court has granted such relief in other cases. See, e.g., In re TBS Shipping Servs., Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. Feb. 28, 2012) [Dkt. No. 75]; In re Hostess Brands, Inc., Case No. 12-22052 (RDD) (Bankr. S.D.N.Y. Feb. 3, 2012) [Dkt. No. 254]; In re The Reader's Digest Ass'n, Inc., Case No. 09-23529 (RDD) (Bankr. S.D.N.Y. Oct. 7, 2009) [Dkt. No. 152]; In re Delphi Corp., Case No. 05-44481 (RDD) (Bankr. S.D.N.Y. Jan. 5, 2007) [Dkt. No. 6461].

8. Moreover, the proposed Final DIP Order provides that the Trustees, the First Lien Noteholders and the 1.5 Lien Noteholders may not recover from the Avoidance Actions (or any proceeds or property recovered in respect of the Avoidance Actions) until commercially reasonable efforts have been undertaken to pay or otherwise satisfy their claims from the other DIP Collateral. See Final DIP Order ¶ 9. As such, any potential standing the

⁴ It should be noted that the Committee's ability, if any, to raise this issue is extremely limited. Traditionally, only a junior lienor may compel the marshaling of assets and generally courts have refused to extend this right to unsecured creditors in bankruptcy proceedings. See, e.g., Gale & Lord, Inc. v. Arley Corp. (In re Arlco, Inc.), 239 B.R. 261, 274 (Bankr. S.D.N.Y. 1999) (holding that unsecured creditors have no right to invoke the doctrine of marshaling) (citing Herkimer Cnty. Trust Co. v. Swimelar (In re Prichard), 170 B.R. 41, 45 (Bankr. N.D.N.Y. 1994)).

While the Committee cites America's Hobby Ctr. for the proposition that an official committee could theoretically be given STN standing to pursue a marshaling claim, America's Hobby Ctr. also recognized that such a claim properly belongs to the Debtors in the first instance. See Official Comm. of Unsecured Creditors of America's Hobby Ctr. v. Hudson United Bank (In re America's Hobby Ctr.), 223 B.R. 275, 287-88 & n.6 (Bankr. S.D.N.Y. 1998) (dismissing without prejudice an official committee's marshaling claim and finding "court approval under STN Enterprises of any amendment to the marshaling claim [is required] because the claim obviously belongs to the estate given that only a trustee may assert it as a hypothetical execution creditor and an unsecured creditor has no standing to do so").

Committee could have on this issue as a hypothetical lien creditor has already been addressed in favor of the Committee.

9. In light of the foregoing, the Committee should not have the benefit of each of the concessions by the Trustees, including the generous Carve-Out, without providing the Trustees with their bargained for provisions. Absent the Trustees' consent to the Carve-Out, the Debtors should not be able to use the Prepetition Collateral to press their proposed cram-down chapter 11 plan against the Trustees (which the Trustees oppose). Instead, such costs should be borne solely by the parties supporting such proposed cram-down plan, *e.g.*, the Ad Hoc Committee of Second Lien Noteholders and Apollo.⁵

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⁵ Payment of attorneys' fees related to the Debtors' proposed cram-down chapter 11 plan should not be paid from the Prepetition Collateral unless there is a direct benefit to the Trustees or if the Trustees provide their consent. See, *e.g.*, In re Flagstaff Foodservice Corp. (Flagstaff I), 739 F.2d 73 (2d Cir. 1984); In re Flagstaff Foodservice Corp. (Flagstaff II), 762 F.2d 10 (2d Cir. 1985); Harvis Trien & Beck, P.C. v. Federal Home Loan Mortgage Corp. (In re Blackwood Assocs., L.P.), 153 F.3d 61 (2d Cir. 1998); In re Hotel Syracuse, Inc., 275 B.R. 679 (Bankr. N.D.N.Y. 2002). Since the Trustees do not support the Debtors' proposed cram-down chapter 11 plan, there is no direct benefit to the Trustees.

CONCLUSION

WHEREFORE, the Trustees respectfully request that the Court grant relief consistent with the foregoing and such other and further relief as it deems just and proper.

Dated: New York, New York
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